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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. STEVEN CARROLL DEMOCKER, Defendant.	No. P1300CR20081339 Div. 6 **MOTION TO STRIKE THE DEATH PENALTY OR IN THE ALTERNATIVE TO PRECLUDE EVIDENCE AND FOR OTHER SANCTIONS BASED ON DESTRUCTION OF BIOLOGICAL EVIDENCE, FALSE REPORTING OF BIOLOGICAL EVIDENCE RESULTS AND DEFIANCE OF THIS COURT'S ORDERS** (Oral Argument and Evidentiary Hearing Requested)

MOTION

Steven DeMocker, by and through counsel, hereby respectfully requests that this Court strike the death penalty based on the State's destruction of biological evidence,

false reporting of biological evidence results and defiance of this Court's orders regarding the notice of destruction of biological evidence. In the alternative, the defense requests that the Court prohibit testimony about the results of testing on the biological evidence that was destroyed and impose further sanctions, including appropriate *Willetts* instructions and the imposition of the costs and expenses born by the defense in connection with the activities described in this Memorandum. This motion is based on the Due Process Clause, the Confrontation Clause, the Eighth Amendment and Arizona counterparts, Arizona Rules of Evidence, Arizona Rules of Criminal Procedure and the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

A detailed history of the State's disclosure violations has been provided to the Court in prior pleadings and will not be repeated. The State has repeatedly ignored the Court's June 22, 2009 disclosure deadline and failed to diligently investigate this case. The State continues to make disclosure even as jury selection is underway. The State continues to disclose results of biological testing of evidence items seized in July 2008 as late as the weeks before trial in April and May 2010.

On April 30, 2010, the defense filed a motion which raised, among other things, some of the issues with the State's late disclosure of information relating to Sorenson Laboratories. The State responded on May 11, 2010, and on the same date, the Court heard argument on some of these issues. The Court found that the State had violated its disclosure obligations and took the sanction under advisement. The Court inquired about the cost of the defense expert in considering a possible sanction. The defense respectfully suggests that such a sanction is not sufficient given the nature of the disclosure violations at issue, the State's defiance of this Court's orders regarding notice of destructive testing and the false reporting of biological evidence that has been discovered thus far in this case.

As a sanction for the State's past disclosure violations, on April 8, 2010 the Court struck the f(2) and (6) aggravators. The case remains a death penalty case with the remaining f(5) aggravator. The Court should now strike the remaining aggravator based on the State's continuing violations of disclosure obligations, their failure to diligently conduct biological testing, their violation of the Court's orders regarding destruction of biological evidence and the false reporting of biological testing results.

1. Failure to Diligently Conduct Biological Testing

On April 14, the State emailed the defense approximately 350 pages of printed materials as well as several .fsa files from Sorenson forensics.[1] Much of this information was related to consumptive YSTR testing that was recommended to the State by DPS on August 1, 2008. (Bates 322-325.) Although Mr. Butner described the DPS recommendation as cryptic during argument on May 11, the DPS report clearly states that further information may be available on a variety of evidence items through YSTR testing and to contact the DPS laboratory. The State did nothing for over 20 months to follow up on the recommendation from DPS. Mr. Buter further tried to excuse the State's irresponsible conduct by claiming that he did not know what YSTR testing was. The State's ignorance and incompetence, in the face of the report's invitation to call DPS for information about YSTR testing is reprehensible. DPS advised the State in August 2008, over 20 months ago, that YSTR testing would yield additional information on the very items the State finally asked Sorenson to test. The State did nothing for 20 months. Suddenly, two and a half weeks before the commencement of a death penalty case that has been pending for a year and a half, the State requested the testing recommended by DPS twenty months earlier. This behavior on the part of the State is completely inexcusable in a death penalty case with a trial

[1] On April 27, 2010, the State, for the first time, identified six additional people involved in this testing from Sorenson as experts. Some of these people were involved with Sorenson testing as early as October of 2008.

date that has been set since May of 2009. The State has admitted its behavior and has offered no good cause for its remarkable failures to exercise due diligence with the biological evidence in this case.

2. Consumption of Evidence Without Notice in Defiance of Court Order

Steve DeMocker's bicycle has been from the beginning of the investigation and prosecution of this case one of the most important pieces of evidence. From day one through Mr. Butner's mini-opening on the first day of jury selection, the State's theory has been that Mr. DeMocker rode his bicycle to an area behind the victim's house, killed her, and then road out. Given the importance the State attached to that bicycle you would think that it might have received special care as an item of evidence and that any DNA testing would have been a high priority. As the following account of the record now makes clear, the State failed to treat this evidence with the care it might appear to have deserved. In addition, within the last 2 months in a scramble to find DNA evidence, the State has chosen completely to ignore not only the rules of good practice but the orders of this Court with respect to testing that could consume evidence. These facts are hard to believe unless clearly presented and supported by the underlying documentary record. None of what follows is debatable.

Steve DeMocker's bicycle was seized from his condominium on July 3, 2008, pursuant to a search warrant. Of course, the warrant itself was based on Mr. DeMocker's explanation that he was riding his bicycle on the preceding evening. The bicycle was placed on a truck and, we now know, brought to the scene of the homicide. It arrived at a time while the evidence collection was still underway and, importantly, while the Department of Public Safety DNA collection officer, Kortney Snider, was present. She had driven down from Flagstaff that morning and was engaged in collecting other evidence from the home that might contain DNA evidence.

Kortney Snider examined the bicycle, but for no apparent reason chose not to swab the seat at all and only did what is known as a "general swab" testing for the presence of blood on the handlebars and pedals. (Kortney Snider Interview I, dated April 21, 2010, at 38-40.) No DNA swabs were collected from the bicycle at that time. Three weeks later, the DPS Lab in Flagstaff received a request from the Sheriff's Office to examine the bicycle and now Ms Snider swabbed the seat—again just to determine the presence of blood. Finding none she did nothing else with the seat and took no further steps to collect possible DNA from the handlebars either. (Kortney Snider Interview II, dated April 22, 2010, at 10-12.) The bicycle then went back to the Yavapai Count storage as Evidence Item 400. There it stayed for the next 18 months or so. It was apparently stored outside with black plastic covering some parts of the bike until February of this year.

On February 17, however, the bicycle was taken from Yavapai County to Salt Lake City by Lt. Rhodes—the officer now claiming responsibility for communications between the Sheriff's Office, the prosecution team, and the two DNA laboratories engaged by the State—Northern Arizona DPS and the private Sorenson Lab. Lt. Rhodes drove the bicycle along with a large list of other evidence to Salt Lake. When he arrived he met with Sorenson Lab personnel, including the administrative coordinator, Carma Smith, and the Lab's "technical lead," Dan Hellwig. (Carma Smith Interview of April 27, 2010, at 58.)

Among the documents available to defense counsel during recent interviews were notes from the meeting between Lt Rhodes and his Sorenson contacts. It now appears that a decision was made at or after this meeting not to do any DNA collection or testing on the bicycle. (*Id* at 57-59.) A decision was made to test a number of other items and it was clear that some or all of this testing might be "consumptive." Recognizing the Order of this Court that all potentially consumptive testing would

require notice to the defense and an opportunity to be present, in fact a "Notice" was filed by the State with this Court on March 13, 2010 identifying a number of items that the State wished to have Sorenson test.

That Notice led to a series of communications, both written and oral, and eventually the defense conducted a telephone interview of the Sorenson "technical lead," Dan Hellwig, to discuss the specific testing his Lab had been asked to perform. During that interview, Mr Hellwig identified each of the items he expected to test and explained why each might consume whatever DNA might be available for testing. Ultimately, an agreement was reached that the defense would have its own consultant, Dr. Norah Rudin, present for the testing.[2] Although the logistics of travel and planning occasioned many dislocations, indeed Ms. Rudin did fly from California to Salt Lake and was present for 3 days of DNA testing commencing March 30. No one involved in the testing at Sorenson was under any misimpression as to why she was there, i.e., to observe the possible consumptive testing of evidence.

Many items of evidence were examined during these days, and this Court has seen and will continue to see testimony and motions with respect to some of them, including the fingernails, the telephone, the door handle, hair from the victim's shorts, etc. One item, however, is nowhere mentioned—the bicycle. The bicycle was not mentioned in the Notice; it was not mentioned as an item to be tested in the telephone interview with Mr. Hellwig. Indeed, the defense had no way of knowing that the bicycle had been taken by Lt. Rhodes from the evidence security area in Prescott to Salt Lake.

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[2] [2] Although the State's Notice filed with the Court invited a defense expert to be present to observe the destructive testing, Sorenson Laboratories objected to the initially disclosed defense expert and attempted to control the identity of a defense observer. After resolving this issue on Friday, March 26, the State insisted that the testing would commence, with or without a defense expert present, on March 30, only twelve days after its initial Notice to the defense and with only one business day notice after its approval of the replacement defense expert observer.

Yet in the middle of the testing we now know that a decision was made to test the bicycle. No notice was given to the defense that this testing was to occur. It was conducted in a separate room at the Lab. Dr. Norah Rudin was neither informed of the testing nor asked to address any issues of DNA consumption. The extraction and testing for DNA from the seat and from the handlebars, we now know, occurred on March 30 and 31. The work was done by several members of the Sorenson staff, and each stage resulted in consumption of all available DNA from the bicycle. The collection of DNA from the seat and the handlebars was done by a serologist. Her goal was to collect with swabs all available DNA from those surfaces. (Interview of Stephanie Masters, April 22, 2010, at 27-31). This was step one. The next step was extraction of whatever DNA might have been captured, and in this stage the entire swabs were consumed, again leaving no remainder for later testing by the defense. This was the second step. The next step was the use of the extract for injection into the sensitive Sorenson equipment, and once again, Sorenson chose to consume 100% of the extracts. So, what we have is three separate decisions to consume all of the available DNA from this evidence item.

The Lab personnel knew that they had been asked to consume the available DNA. The Lab's supervisors refused to proceed without a letter authorizing them to consume the sample of DNA from the bike. Unbeknownst to the defense, the Lab received such a letter. Lt. Rhodes, copying Mr. Butner, informed the Lab via email that Mr. Butner approved the consumption of swabs from the bicycle. Why this was done is a total mystery. All other testing to be performed at that Lab at that time was pre-approved consumptive testing to be observed by the defense expert. This particular consumptive test was nowhere disclosed, and it was kept secret from Dr. Norah Rudin. Everyone interviewed at Sorenson knew why Dr. Norah Rudin was there, but for some reason no one informed her of this particular series of totally consuming DNA tests

performed in a room adjacent to the room in which Ms. Rudin was sitting. No request was made to the Court either.

The bike was secretly tested and all DNA was consumed in a search for the victim's blood. They found none, of course. But Sorenson's results indicate instead that no meaningful comparison can be made to the victim's DNA. The consumption now renders Y-STR testing impossible. Mr. DeMocker said he was riding that bike. Other male DNA has been found, but not sufficient quantities to test. The absence of Mr. DeMocker's DNA is easy to explain by what he was wearing and the fact that the State's collection and storage of the bike was sloppily performed. The other DNA, if properly profiled, could match with the many cops who handled the bike. The secret testing was done in a last ditch effort to find some way to tie the victim to the bike, and that failed, but in failing the State removed whatever exculpatory evidence might have been available to Mr. DeMocker. This testing was hidden from the Defense, the Court and the defense observer who was present while this consumptive testing was being performed.

The State's response at the May 11 hearing that "these things just happen" is remarkable. Apparently the State is unconcerned that it destroyed biological evidence, in direct violation of this Court's orders and pleadings the State filed in this case. The State's callous disregard for this Court's order and Mr. DeMocker's rights, while it simultaneously seeks to execute one of its citizens, is frightening and deserves a serious sanction by this Court. Dismissal of the remaining aggravator is appropriate given the State's conduct.

3. False Reporting of Biological Results

Included in the 350 pages of late disclosed Sorenson materials was a report that contained false conclusions about critical biological evidence. This was a remarkable and glaring error about the key biological evidence of unknown male DNA found under

the victim's fingernails. This false conclusion somehow made it through two levels of review at Sorenson Laboratories. Exactly how this could have occurred on the most critical item of evidence in this death penalty case has yet to be explained. During defense interviews with a Sorenson analyst on April 27, the analyst admitted her error and attempted to explain that she had made a "typo." The "typo" was an incredibly significant error that transposed the name of Mr. DeMocker with Mr. Knapp. The original false report concluded that Mr. DeMocker could not be excluded from the minor profiles under the victim's fingernails and that Mr. Knapp could be excluded from the minor profiles. The scientifically correct result is that Mr. DeMocker can be excluded from both the major and minor male profiles found under Ms. Kennedy's left fingernails and Mr. Knapp cannot be excluded from the minor profiles. It was only through defense questioning that this "typo" was finally acknowledged by Sorenson.

In other parts of the report Sorenson opines that "no meaningful comparison can be made to Mr. DeMocker." This language is extremely misleading because it does not address why no meaningful comparison can be made and may mislead and confuse the jury about whether or not Mr. DeMocker's DNA might be present. The report suggests that the absence of a meaningful comparison is specific to Mr. DeMocker when it is not.

This false, late reporting about the critical piece of evidence should be sanctioned by this Court. It is all the more offensive because the State delayed for twenty months the testing that was advised to do in August of 2008, leaving the defense only a few weeks to review and catch the "typos" of Sorenson Laboratories on critical evidence items. The combination of these two facts as well as the late time frame of this disclosure should lead the Court to strike the remaining aggravator in this case.

4. Appropriate Sanctions

Rule 15.7 gives the Court wide discretion in imposing a sanction. The permitted sanctions under Rule 15.7 include precluding or limiting the calling of a witness, use of

evidence or argument; dismissing a case; granting a continuance or declaring a mistrial; holding counsel in contempt; imposing costs; or other appropriate sanctions. Given the depth and breadth of the violations at issue and the limited time to trial, in a case where Mr. DeMocker's life is on the line, counsel request that the Court now dismiss the remaining f(5) aggravator.

The State continues to violate its disclosure obligations subsequent to this Court's initial sanctions. The State waited 20 months to perform biological testing it could have and should have performed in August of 2008. Its only proffered excuse for its failure is its own incompetence and ignorance. The State also violated the Court's orders with respect to the destruction of biological evidence and notice to the defense. This testing was secreted from the defense expert observer who was on site at the time. Its only reaction to this remarkable series of events is that "these things happen." Finally, the test results of key biological evidence were falsely reported. This remains unexplained other than as a "typo" on the most critical piece of biologic evidence in this case. This is all being discovered by the defense within one week of jury selection in a capital case. This combination of events should lead the Court to dismiss the death penalty.

This case remains a death penalty case on the basis of only one remaining aggravator. The State has engaged in an ongoing pattern of disclosure misconduct in this case that has continued despite this Court's earlier sanctions. This is a case where the biological evidence is entirely exculpatory and there is no physical evidence connecting Mr. DeMocker to the crime. The State should not be permitted to play games with critical biological evidence, remain indifferent to the Court's orders, and violate the law of disclosure and Mr. DeMocker's rights with impunity while it seeks to kill one of its citizens. At this stage and considering these violations, the only

appropriate sanction is dismissal of the death penalty entirely. This sanction is appropriate under Rule 15.7.

If the Court, over the defense objection, does not dismiss the death penalty, all testimony about the testing on evidence item 400 (the bike) should be precluded and further serious sanctions should be imposed against the State.[3] A *Willits* instruction on the consumptive testing in violation of the Court's order should also be given. If the Court is considering imposing sanctions of costs, an insufficient sanction in the defense view, in addition to the costs and expenses of Dr. Rudin, the costs and expenses of counsel to prepare for and conduct the multiple interviews at Sorenson, travel to Salt Lake for the interviews, and counsel's time in litigation of these issues should be included.

DATED this 14th day of May, 2010.

By: _____

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ORIGINAL of the foregoing sent via hand delivery for filing this 14th day of May, 2010, to:

[3] The Court inquired of the expense for the defense expert to observe the testing. The defense does not believe that imposing costs is a sufficient sanction. For the Court's benefit, the total fees and costs for the defense expert observer were $7,070.46.

Jeanne Hicks
Clerk of the Court
Yavapai County Superior Court
120 S. Cortez
Prescott, AZ 86303

COPIES of the foregoing hand delivered this 14th day of May, 2010, to:

The Hon. Thomas B. Lindberg
Judge of the Superior Court
Division Six
120 S. Cortez
Prescott, AZ 86303

Joseph C. Butner, Esq.
Jeffrey Paupore